STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

Judge: Meter, P.M.
McDonald, G.R.
Griffin, R.A.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DONNA ALICE YOST,

Defendant-Appellee.
_____/

Supreme Court No. 119889
Court of Appeals No. 234065
Circuit Court No. 00-1304-AR
District Court No. 00-FY-4070-L

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

(Oral Argument Requested)

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STATEMENT OF BASIS OF JURISDICTION

The jurisdictional summary in Defendant/Appellant's Brief on Appeal is complete and correct.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

WHEN THERE WAS CONFLICTING CREDIBLE EVIDENCE, DID THE MAGISTRATE ABUSE ITS DISCRETION WHEN IT REFUSED TO BIND THE CASE OVER FOR TRIAL?

Defendant/Appellant answers "NO."

Plaintiff/Appellee answers "YES."

The Trial Court answers "YES."

SHOULD THE ABILITY OF THE MAGISTRATE TO ASSESS CREDIBILITY OF THE WITNESS AT THE PRELIMINARY EXAMINATION BE LIMITED?

Plaintiff /Appellee answers "YES."

DID THE REVIEWING COURT APPLY THE CORRECT STANDARD WHEN AFTER REVIEWING THE ENTIRE RECORD IT MADE A DETERMINATION THAT THE MAGISTRATE ABUSED ITS DISCRETION?

Defendant/Appellant answers "NO."

Plaintiff/Appellee answers "YES."

The Trial Court answers "YES."

COUNTER-STATEMENT OF FACTS

The Defendant/Appellant, Donna Alice Yost, was charged with a two count complaint charging Open Murder, contrary to MCL 750.316, and Felony Murder, contrary to MCL 750.316, which offense was alleged to have occurred on October 10, 1999, at 200 North Madison, Bay City, Bay County, Michigan, involving the death of her seven year old daughter, Monique Yost.

The Court held the Preliminary Examination to determine if probable cause existed to bind the Defendant/Appellant over for trial in Circuit Court for the murder of Monique Yost. The District Court did not find sufficient evidence to bind the Defendant/Appellant over and dismissed the charges.

Monique Yost was a seven year old child who died on October 10, 1999, at approximately 8:00 p.m., from an overdose of Imipramine, an anti-depressant drug also used in the treatment of bed-wetting. Dr. Evans, a toxicologist with AIT Laboratories, testified at the Preliminary Examination that the blood sample from Monique Yost was analyzed and showed a blood count Imipramine level of 1,950 nanograms per milliliter, which was 15 times the therapeutic value and would have been a fatal dose. (38b) Dr. Evans reached this conclusion on October 28, 1999.

The analysis performed by Dr. Evans' lab was then submitted to Dr. Virani, the forensic pathologist who performed the autopsy on Monique Yost, and his conclusion was that Monique Yost died of acute Imipramine intoxication. (22b-23b)

On October 12, 1999, the day after the autopsy, but well before the toxicology results were conclusive, Detective Vosler along with Detective Kenyon and Jane Smith, went to the Defendant/Appellant's residence to speak with her regarding the death of her child. (42b-43b) The Defendant/Appellant indicated that on the weekend that she died, Monique was grounded to the

home because she had taken off again without permission and she was not allowed to go to her adopted grandmother's house, Kathy Tomlinson, for the weekend. (44b)

The Defendant/Appellant told Detective Vosler that Monique was helping her on Sunday, October 11, 1999, with household chores and because she was being good and was listening, the Defendant/Appellant let her go outside and play, but was instructed to stay in the yard. (45b) After about 15-20 minutes, the Defendant/Appellant said that she went to look for Monique and she was down towards Jackson Street and was coming home. As Monique got closer, Defendan/Appellant said, "Get your ass over here now, I am pissed." The Defendant/Appellant further told Detective Vosler that she paddled the child on her "butt" once and said, "Get your damn ass on the couch and you lay down, you're taking a nap, I'm pissed." (46b)

The Defendant/Appellant said that her daughter was sleeping until approximately 5:00 p.m. or 5:30 p.m., when some neighbor friends came over from next door and she tried to wake her up a couple times. The child went limp and went into a seizure. Eventually 911 was called and her daughter was taken to the hospital. (47b)

During this interview Defendant/Appellant was asked repeatedly if she knew what happened to her child. Specifically, she was asked whether or not she knew if she injested any medicines or poisons. The Defendant/Appellant repeatedly told the investigators that she knew that Monique did not get into any of her medication or her husband's or her son's because she had already checked all of their medications and knew that there was nothing missing. (49b-51b) The Defendant/Appellant also told the investigators that her daughter never took pills on her own and when her daughter would find a pill she would give it to the Defendant/Appellant so that the Defendant/Appellant could throw it away. (53b) During this same interview, Detective Vosler asked the Defendant/Appellant if

Monique ever had any problem with her breathing while she was sleeping. Defendant/Appellant stated that three or four years ago she had liquid Ventolin:

> "No, she's, ah, I mean - it's three maybe four years since I had any medicine. Ah, last year I think I just dozed out her Ventolin that she had up in liquid Ventolin, you know, cuz that's what they gave me and, ah, that's when I started out originally with her breathing machine was for her, you know." (57b)

No mention was made of Monique's other "sleeping medication". The Defendant/Appellant also had a number of Monique's other medication for both her ear and her eyes when they were infected and said, "I try to keep some on hand." (52b) She threw Monique's bed-wetting medicine away even though Monique was continuing to have problems sleeping. (7b-8b, 9b-10b) Detective Vosler concluded the interview of the Defendant/Appellant and stated to her that they were going to do further tests on the tissues of her daughter to make a conclusive finding as to what caused her death. (55b-56b)

The very next morning, Detective Vosler received a phone call left on his answering machine from Lonny Yost on October 13, 1999, that he and his wife wanted to see Vosler at their house. When Vosler arrived at the home Lonny Yost had a pill bottle in his hand without a cap and directed the officers upstairs above the kitchen where they recovered 46 tablets of Tofranil (which is the prescription that was given to Monique Yost, commonly known as Imipramine) for her bed-wetting. (58b-58b)

After finding the pills on the floor the detectives asked the Defendant/Appellant to come down to the station for an interview on the 15th of October. The Defendant/Appellant told Detective Vosler that the medicine that the officers found on the floor was medicine that Monique was taking after being molested, but that Defendant/Appellant was gradually taking Monique off the medicine.

The last time Monique took it was approximately two - three months prior to when the officers found the medication. (62b - 64b) During this same interview, the Defendant/Appellant elaborated further, telling the Detectives some of the stories her daughter was telling and even making reference to Protective Services getting involved because of some of her daughter's allegations. (65b) Defendant/Appellant also told Detective Vosler after seeing the medicine that the Defendant/Appellant thought that her daughter took it. In a later conversation on October 15, 1999, Defendant/Appellant's story was embellished even further when Vosler asked if she thought Monique took some pills, she stated that she was thinking that Monique killed herself and that she had never tried that before. (66b-67b)

In response to Detective Vosler's question about young kids committing suicide, the Defendant/Appellant stated,

> "Monique went through a lot, she really did, it's to bad that at seven and eight years old that no matter where you walk down the street somebody says you had sex with your brother. Ha, ha, ha. You're having sex with your brother, you're making love to your brother." (68b)

After further discussion with the Defendant/Appellant, the Defendant/Appellant admits that besides all the teasing that her daughter had taken in reference to having sex with her brother, she admitted during this third interview that there was also a CSC interview that was supposed to occur after receiving a phone call on Thursday from the Bay County Prosecutor's Office. (68b-69b)

Kathleen Tomlinson testified in regard to Monique having on one occasion taken some vitamin pills according to a conversation that she had with Donna and how very distraught and upset she was that Monique had taken half a bottle of these vitamins and how she was rushed to the hospital. (71b-72b)

During a third interview Defendant/Appellant/Appellant described Monique being sexually abused and teased and went on to tell Detective Vosler how fed up she was with everything and that Kathy Tomlinson had told her that Monique wanted to kill herself in relationship to all of the things that had been occurring to her. (67b) In reality, on cross-examination Kathy Tomlinson said that Monique had said something about wanting to be dead, which occurred several months prior to her death and could have been in relationship to her brother kicking her in her back. (73b)

Mr. Buggs, the principal at Washington Elementary School, testified that Monique was attending classes there. His description of Monique was that of a very happy little girl. He stated:

> "... everybody knew Monique, just a very happy little girl everywhere she went, from the morning she stepped off the bus, people were attracted to her, adults, parapros, kitchen helpers, myself, she was just -- she lit up the -- she was a very happy little girl." (78b)

The People also introduced the testimony of David Garcia, who was Monique's most recent counselor through Bay-Arenac Mental Health, who testified that the Defendant/Appellant was very concerned about Monique making false accusations about her to Protective Services . Monique was saying that she was being beaten, spanked, etc. (1b-2b) Mr. Garcia testified that the Defendant/Appellant never mentioned anything about her conversation with Kathleen Tomlinson regarding Monique being severely or emotionally depressed and/or suicidal. On October 5, 1999, Mr. Garcia indicated that he also spent some time with Monique, making a home visit, and he again did not see anything that would indicate that she was upset or depressed. In fact, her mother had indicated that Monique seemed to be acting better at home. (3b-4b) Also called by the prosecution were two former counselors, Michelle Hugo and Tamara Gandy, who both testified that although Monique had some anxiety and depressed mood as a result of her being sexually abused, there was

never any type of serious depressive disorder or suicidal ideations typically associated with major mood disorders. (12b-18b)

Cindy Howell of the Bay County Prosecutor's Office called and spoke with the Defendant/Appellant on Thursday before Monique's death regarding an upcoming interview in regard to a sexual molestation charge where Monique was the victim. Ms. Howell then called the Bay City Police Department to look into the matter and found that an autopsy was set for 3:30 p.m. on October 11, 1999, which was going to be performed by Dr. Virani. (74b-77b)

Dr. Virani, after receiving the toxicology report rendered his opinion that Monique had died of an acute overdose of Imipramine. He concluded that the death was a homicide. Dr. Virani's testimony regarding his conclusion states as follows:

> A Logically, it gives me only one conclusion and that is that the – she probably did not take the tablets intact, otherwise I would find some residue of tablets or granular material in her stomach or intestine, probably it was made in a liquid form and was introduced to the body or ingested in the stomach in a liquid form, so it can absorb very easily and you don't see any residue effect at all in the stomach or intestine.
>
> Q Your report also indicates that the manner of death is a homicide, could you explain that.
>
> A Yes, given the huge amount of imipramine in her system and considering her age of seven, which is not anywhere . . At that age the human child cannot make a determination of taking – understanding what is the effect of imipramine would be, how much it would take to end human life, considering that age and the huge amount of imipramine in her system it is not anything other than a homicide that she has to be given by somebody else. (26b-27b)

Dr. Virani further concluded, based on his calculations from the toxicity level provided by the lab, that being 1,950 nanograms, that it would have taken between 90-100 tablets to reach that level. (37b) Dr. Virani further testified that although he was not a psychiatrist, it was his expert opinion,

given the fact that he has done over 9,000 autopsies, and given the circumstances of the child's death, the level of Imipramine in her system, and the lack of residue of tablets found in her stomach during the autopsy, led him to the conclusion that this case was a homicide and not a suicide. (30b-31b)

Dr. Virani's testimony was corroborated through the expertise of Dr. Evans, who testified that his lab has directly dealt with acute Imipramine overdoses and during those overdoses they have never seen a case where pill fragments have not been seen in the gastric contents. (39b) Dr. Virani also testified he has previous experience with this drug in that he did find imipramine tablets residue in a stomach content at an autopsy.

In regard to the child possibly self-medicating herself, Dr. Virani responded as follows:

> "If her blood level of imipramine was somewhere on the border line, yes, I would say your question answer, yes, but when you have a tremendous amount of blood level that curiosity is not there anymore, it is a so large amount that you have to take so many tablets, I even don't know how to count that it's impossible for the child to swallow that many out of curiosity." (35b-36b)

The defense provided other expert witnesses who testified at the Preliminary Examination, including Dr. David Fleisher, a professor of pharmaceutics from the University of Michigan, who testified that he carried out a laboratory experiment concerning the dissolution characteristics of 30, 10 milligram Imipramine tablets in about 3 fluid ounces of hydrochloric acid and also in water. Dr. Fleisher conducted his experiment in the laboratory setting. Dr. Simson who requested the experiment concluded that there is no way to tell "whether the stuff (pills) was ground up in some form or whether it had been taken in its tablet form, there's no way to make that distinction." (89b)

According to Dr. Simson's testimony, he was not aware or familiar with the solubility characteristics of Imipramine tablets and so he had requested that an experiment be conducted to check out not only how long it would take to dissolve the tablets, and what the tablets would look

like after they had been dissolved. (84b) He disagreed with Dr. Varani's conclusions about the expected dissolution of the tablets. (86b)

In addition to all the other evidence presented at the Preliminary Examination and taking all the evidence at a whole, it was significant according to the People that when interviewed by Detective Vosler, the Defendant/Appellant stated, "I didn't mean to kill her, I didn't watch her, I didn't watch her, oh, good enough." (80b-81b)

ISSUE I

THE MAGISTRATE ABUSED ITS DISCRETION WHEN IT REFUSED TO BIND THE CASE OVER FOR TRIAL WHEN THERE WAS CONFLICTING CREDIBLE EVIDENCE.

THE CIRCUIT COURT REVIEWS THE MAGISTRATES DECISION REGARDING BINDOVER FOR AN ABUSE OF DISCRETION. PEOPLE V DRAKE, 246 MICH APP 637; 639 NW 2D 469 (2001)

In making a determination as to whether a trial court abused its discretion one must take a look at the function of the magistrate as it relates to the bindover. Court rule, statute and case law have all indicated that the function of the magistrate is to make a two fold determination: that a crime has been committed and whether there is probable cause for charging defendant with that crime. MCR 6.10(E), MCL 766.13 MSA 28.931 People v Duncan, 388 Mich 489, 499; 201 NW 2d 621 (1972), People v Mason, 247 Mich App 64, 71; 634 NW 2d 382 (2001).

The record in this case shows that the magistrate clearly violated the legal duty to bindover when there was conflicting competent evidence and the magistrate did not look at and adequately consider all of the evidence. There was more than enough evidence presented by both sides, much of which was conflicting, in order to require a bindover. When evidence conflicts or raises a reasonable doubt of guilt the case must be bound over. Drake, supra 640. When there is a failure to perform a clear legal duty then there is an abuse of discretion. People v Veal, 101 Mich App 772, 774-775; NW 2d 516 (1980).

Plaintiff/Appellee takes the position that the Magistrate abused its discretion because it relied solely on the credibility of witness Dr. Virani and did not consider all of the relevant testimony and evidence particularly the conflicting evidence and in so doing breached the duty to bindover. It is quite clear that a magistrate when making a determination as to whether a crime has been committed

must look at all of the evidence. People v King, 412 Mich App 145, 154; 312 NW 2d 629 (1981), People v Hudson, 241 Mich App 268, 278; 615 NW 2d 784 (2000). The magistrate in his opinion and analysis based his determination on Dr. Virani's testimony and the other experts almost to the exclusion of all other testimony. He never indicated or remarked in any significant way about any of the other evidence that was presented or was argued by the prosecution. (19a-21a) The Magistrate's main contention appears to have been that Dr. Virani was not an expert in psychiatry, psychology, pharmacology, or pharmaceutics, and thus could not make a determination that the death was not a suicide. It is the position of Plaintiff/Appellee that with or without the testimony of Dr. Virani's opinion regarding suicide, there was more than enough credible evidence for the Magistrate to make a determination that a homicide had been committed had all the evidence been considered adequately. The magistrate does not have to find proof beyond a reasonable doubt. Evidence regarding the elements of the crime charged must be found, but that evidence may be inferred from other evidence presented. People v Hudson, supra; People v Selwa, 214 Mich App 451, 457; 543 NW 2d 321 (1995) Despite defenses witnesses who testified regarding the issue of the child's suicide, there was evidence regarding no pill residue in the child's body (21b) and that there was an enormous amount of pills that had to have been taken in order for this child to have that amount of medication in her system. (37b) There was the testimony of the counselors that the child was not suicidal. (13b-18b) There was testimony of Detective Vossler regarding the mother's comments about she didn't mean to kill her child, and then there was the mysterious reappearance of the pills three days after the child's death and after it came to the attention of the mother that there would be an autopsy and investigation into the death. (58b-63b)

The Court of Appeals in the case of Hudson has given a relatively good description of what is and is not required of the Magistrate in making the determination as whether the crime has been committed and to when there is probable cause to believe that the Defendant has committed that crime, the Court stated the following:

> "MCL 766.13; MSA 28.931 establishes a magistrate's responsibility when presiding over a preliminary examination:
>
> If it shall appear to the magistrate at the conclusion of the preliminary examination that a felony has been committed and there is probable cause for charging the defendant therewith, the magistrate shall forthwith bind the defendant to appear before the circuit court of such county, or other court having jurisdiction of the cause, for trial.
>
> See also MCR 6.110(E). Appellate decisions, over the years, have given considerable gloss to the dual requirements that there be evidence that a felony was committed and "probable cause" to believe that the defendant committed that felony. See, e.g., People v. Doss, 406 Mich. 90, 100-101, 276 N.W.2d 9 (1979); People v. Asta, 337 Mich. 590, 609-610, 60 N.W.2d 472 (1953). In People v. Justice (After Remand), 454 Mich. 334, 344, 562 N.W.2d 652 (1997), quoting Coleman v. Burnett, 155 U.S. App.D.C. 302, 316-317, 477 F.2d 1187 (1973), the Michigan Supreme Court remarked that
>
> "[i]t is the contrast of probable cause and proof beyond a reasonable doubt that inevitably makes for examinatorial differences between the preliminary hearing and the trial. Probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. Proof beyond a reasonable doubt, on the other hand, connotes evidence strong enough to create an abiding conviction of guilt to a moral certainty. The gap between these two concepts is broad. A magistrate may become satisfied about [241 Mich.App. 278] probable cause on much less than he would need to be convinced. Since he does not sit to pass on guilt or innocence, he could legitimately find probable cause while personally entertaining some reservations. By the same token, a showing of probable cause may stop considerably short of proof beyond a reasonable doubt, and evidence that leaves some doubt may yet demonstrate probable cause." [Emphasis added in Justice.]

> It is clear from these decisions, especially Asta and Doss, that the magistrate is not required to find that the evidence at the time of the preliminary examination proves the defendant's guilt beyond a reasonable doubt in order to bind the defendant over for trial on the charge.
>
> Despite this rather low level of proof, the magistrate must always find that there is "evidence regarding each element of the crime charged or evidence from which the elements may be inferred" in order to bindover a defendant. People v. Selwa, 214 Mich.App. 451, 457, 543 N.W.2d 321 (1995). If the evidence introduced at the preliminary examination conflicts or raises a reasonable doubt about the defendant's guilt, the magistrate must let the factfinder at trial resolve those questions of fact. This requires binding the defendant over for trial. People v. Hill, 433 Mich. 464, 469, 446 N.W.2d 140 (1989). In other words, the magistrate may not weigh the evidence to determine the likelihood of conviction, but must restrict his or her attention to whether there is evidence regarding each of the elements of the offense, People v. Coons, 158 Mich.App. 735, 738, 405 N.W.2d 153 (1987), after examining the whole matter, People v. King, 412 Mich. 145, 154, 312 N.W.2d 629 (1981). The evidence that factors into the magistrate's decision may be direct or circumstantial, People v. Terry, 224 Mich.App. 447, 451, 569 N.W.2d 641 (1997), [241 Mich.App. 279] and it meets the "probable cause" standard when, "by a reasonable ground of suspicion, [it is] supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged," People v. Woods, 200 Mich.App. 283, 288, 504 N.W.2d 24 (1993)."

The Circuit Court in reviewing the Magistrate's determination held that in finding that Dr. Virani's testimony lacked credibility, the District Court in fact was comparing the credibility of the experts and exceeded its authority and precluded the trier of fact from making the decision. Whether or not Dr. Virani could testify as to the capability a child of age seven to commit suicide, is irrelevant as it relates to the issue of probable cause. The Magistrate did not need to decide if there was a suicide as opposed to a homicide. All that the Magistrate needed to decide was if there was support for the finding that there was evidence on each of the elements of the crime to warrant a bindover. If these elements were present and even if there was conflicting evidence then the court would have to bindover. People v Laws, 218 Mich App 447, 452; 554 NW 2d 586 (1996); People v Moore, 180 Mich App 301, 309; 446 NW 2d 834 (1989); People v Ross, 145 Mich App 483, 493; 378 NW 2d

517 (1985). Dr Virani's conclusions were based on the fact that he had done the autopsy. Although Dr. Virani could not determine the initial cause of death, he sent the blood and urine samples to the State Police Crime Lab for testing. A toxicology report was sent to the American Institute of Toxicology, where Dr. Evans analyzed the blood of Monique and it was determined that she had 1,950 nanograms of Imipramine per milliliter in her blood. (22b) Dr. Evans testified that would have been 15 times the prescribed dosage and most certainly would have been a fatal dose. (38b) It is of significance that this report was prepared and sent to Dr. Virani on October 28, 1999. (22b) Dr. Virani testified that the autopsy examination of the stomach and small intestine revealed:

> . . .about 200 grams of partially digested food in a semi-liquid form. . . I did not find any residue of the pills or any granular material which comes from digestion of the pills." (21b)

Dr. Virani, after receiving the toxicology report rendered his opinion that Monique had died of an acute overdose of Imipramine. He concluded that the death was a homicide. Dr. Virani's testimony regarding his conclusion states as follows:

> A Logically, it gives me only one conclusion and that is that the – she probably did not take the tablets intact, otherwise I would find some residue of tablets or granular material in her stomach or intestine, probably it was made in a liquid form and was introduced to the body or ingested in the stomach in a liquid form, so it can absorb very easily and you don't see any residue effect at all in the stomach or intestine.
>
> Q Your report also indicates that the manner of death is a homicide, could you explain that.
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> A Yes, given the huge amount of imipramine in her system and considering her age of seven, which is not anywhere . . At that age the human child cannot make a determination of taking – understanding what is the effect of imipramine would be, how much it would take to end human life, considering that age and the huge amount of imipramine in her system it is not anything other than a homicide that she has to be given by somebody else. (26b-27b)

Dr. Virani further concluded, based on his calculations from the toxicity level provided by the lab, that being 1,950 nanograms, that it would have taken between 90-100 tablets to reach that level. (37b) Dr. Virani further testified that although he was not a psychiatrist, it was his opinion, given the fact that he has done over 9,000 autopsies, and given the circumstances of the child's death, the level of Imipramine in her system, and the lack of residue of tablets found in her stomach during the autopsy, that this case was a homicide and not a suicide. (30b-31b)

Dr. Virani's testimony was corroborated through the expertise of Dr. Evans, who testified that his lab has directly dealt with acute Imipramine overdoses and during those overdoses they have never seen a case where pill fragments have not been seen in the gastric contents. (39b) Dr. Evans testimony was not found to be incredible by the magistrate. In regard to the child possibly self-medicating, Dr. Virani responded as follows:

> "If her blood level of imipramine was somewhere on the border line, yes, I would say your question answer, yes, but when you have a tremendous amount of blood level that curiosity is not there anymore, it is a so large amount that you have to take so many tablets, I even don't know how to count that it's impossible for the child to swallow that many out of curiosity." (35b-36b)

The defense provided other expert witnesses who testified at the Preliminary Examination, including Dr. David Fleisher, a professor of pharmaceutics from the University of Michigan. He testified that he carried out a laboratory experiment concerning the dissolution characteristics of 30, 10 milligram Imipramine tablets in about 3 fluid ounces of hydrochloric acid and also in water. Dr. Fleisher conducted his experiment in the laboratory setting.

Judge Leaming, in his written Opinion of September 12, 2000, apparently found it significant that Dr. Fleisher in response to a question as to whether or not he had ever been exposed to specific information regarding self-induced overdose of Imipramine in young children, stated that he did, in

fact, rely on a journal from the American Medical Association dealing with Imipramine overdoses of the drug. Dr. Fleisher testified that his information regarding self induced overdoses of Imipramine in young children came from an article in the Journal for American Medical Association dealing with overdoses of the drug. The report noted two cases involving children. (95b-96b) Dr. Fleisher also testified that he had never attended an autopsy where there had been an overdose of a particular controlled substance for a prescription drug. (97b) He did not read the autopsy report done on Monique. (98b-99b) Dr. Simson also an expert on behalf of the defense testified that there was no way that one could tell whether the pills were ground up in some form or that they had been taken in tablets form. There was no way to make that distinction. (79b) Simson was not familiar with soluble characteristics of the tablets and it was he who had requested that the experiment be done as to how long the tablets would take to dissolve. (84b) Dr. Simson also testified that he had never performed an autopsy on an individual who had consumed the quantity of drugs as in the case at bar by ingesting drugs and that he in thirty years of practice he had never seen a child in this age group commit suicide. (90b-94b) Dr. Berman a clinical psychologist from the American Association of Suicidology testified that children under the age of ten do kill themselves, he also noted that they were not frequently counted as suicides but there were a number of cases of child suicides. (79b)

As it relates to these expert witnesses the Magistrate had an abundant amount of information in front of it, much of which was contradictory. There was a young child who died with an extraordinary amount of a prescription drug in her system. One forensic pathologist testified that there were no evidence of the pills in her stomach at the time of the autopsy. He had done autopsies where people died from an overdose of this particular pill but had never done an autopsy on a child who had committed suicide in this matter. As a matter of fact he had never done an autopsy for a

child who had committed suicide. The other forensic pathologist testified that after having an experiment done that there would be expected to be no residue left in the stomach. (73b-75b) He also likewise testified that he had not ever seen a child suicide in the age group (7 years) during the course of his career as a forensic pathologist. There was also testimony from an expert dealing with suicide that children through the age of ten do commit suicide. (79b) One of experts testified that the taste of this particular drug would be very unpleasant both in a dissolved form in the water or orally by chewing it. (40b-41b)

Besides the testimony of the experts there was also the testimony relating to the child as being depressed and suicidal, several individuals who were dealing with the child in counseling stated that the child was not depressed and one counselor did not think she was suicidal. (19b-21b, 22b-25b) The pills were not discovered until October 13, 1999 on the second floor bedroom that had been occupied by the Defendant/Appellant and others the day after Monique's death and her funeral. It is significant that the drugs were not found until October 13, 1999, when one considers the Defendant/Appellant's statement to Detective Vosler that she had checked all of the medication and nothing was found to be out of order or missing. (49b-51b) This is also significant in terms of the fact that Detective Vosler had told the Defendant/Appellant that they were going to be doing further tests on Monique's tissue and the pills miraculously showed up the very next morning. (58b-61b) Mary Gomez, a neighbor of the Yosts, testified as follows regarding how strange it was that the pills were discovered on Wednesday:

> They were in one of the bedrooms upstairs, going up the stairs, and it just seemed so strange to me 'cuz I know during this whole time, you know, during the time of the death to the time of the funeral we spent time with Donna, you know, there was people coming in and out, Donna wanted to be alone, so her and I would go up to that same exact room and, you know, I'd comfort her, I'd try to talk to her and she

> just wanted peace and quiet, you know, be left alone, let me mourn on my dead child or whatever she felt, um, but that whole time we were in and out of that room those pills were never, ever there. I would have seen those pills, there's just no doubt in my mind I would have seen those pills, they were never there." (82b-83b)

When one places all of the evidence together, a reasonable individual looking at the circumstances could conclude that this reasonably healthy child would not voluntarily consume in excess of 90 pills that had a very unpleasant taste. That reasonable person could also conclude that because there was no trace of medication in her stomach after the autopsy that the pills were diluted in some type of liquid which might mask the taste of the medication. It can be inferred from the quantity of the pills that the intent of the person giving the child the liquid would be to cause her death. It could also be inferred from the fact that the mother did not readily mention the pills at first and after being interviewed and after the autopsy the pills miraculously appeared in an area where people had been walking over the period of time since the child's death. Not withstanding the fact that there may have been other evidence to the contrary, it cannot be said that there was not enough credible evidence to support the charge of murder.

As it relates to the issue of probable cause Judge Leaming failed to appropriately consider the numerous conflicting statements given by the Defendant/Appellant. He failed to consider that on October 15, 1999, the defendant told Detective Vosler how she thought that her daughter committed suicide by taking an overdose of her bed-wetting medicine when, in fact, the toxicology report was not yet even concluded until October 28, 1999. (65b-67b) The only person who would know whether Monique ingested her own medication was the person who, in fact, had given it to Monique. Judge Leaming failed to appropriately consider that the defendant was concerned over her daughter, Monique, falsely accusing Defendant/Appellant of improperly hitting and punishing her (1b-2b), and

over the upcoming interview with her daughter regarding criminal sexual conduct allegations. Defendant/Appellant was also aware that there were allegations that her son, Joshua, may also have been abusing Monique. (68b) Given the fact that the Prosecutor's Office called on Thursday, three days before the death of this child to schedule an appointment, the Defendant/Appellant had a strong motive from keeping this child from being interviewed by the Prosecutor's Office.(74b-77b) It was admitted by the Defendant/Appellant during her interview with Detective Vosler that the child had a history of making up accusations regarding Defendant improperly hitting and punishing her. It was also disclosed during her interview with Detective Vosler that the Defendant/Appellant was aware that there were accusations regarding her son molesting the victim as well. This evidence was introduced to show malice and to explain the motive that prompted the Defendant/Appellant to commit the crime charged. Malice and motive may properly be shown by such evidence as tending to prove the elements of the crime. See People v McClure, 29 Mich App 361, 370; 185 NW2d 430 (1971). Judge Leaming also failed to appropriately consider that Monique had a long history of taking off and leaving home without telling her parents where she was going. On this particular weekend, Monique had been grounded by her mother but was again allowed to go out and play on Sunday, the day of her death. (44b) Defendant/Appellant told Detective Vosler how angry and upset she was and how she made Monique come into the house and take a nap on the couch, a nap from which she never awakened. (46b) The Defendant/Appellant also told Detective Vosler that she didn't mean to kill her, that she didn't watch her good enough. (80b-81b) All of this evidence according to Judge Leaming was "little evidence to link the Defendant/Appellant to the crime". When the Court considers all of the evidence presented at the Preliminary Examination there is much

evidence which links the Defendant/Appellant to this crime. Judge Leaming dismissed the charges applying a much higher standard of proof then that which is required.

Accord the standard of proof as set forth in People v Graves, 79 Mich App 103, 105; 261 NW2d 228 (1977): "Probable cause does not mean proof beyond a reasonable doubt. Neither does it mean evidence to support a guilty verdict nor even enough evidence to defeat a motion for directed verdict at the conclusion of the prosecution's case. There need only be some evidence to satisfy the magistrate that there is probable cause to believe the defendant committed the crime." (Emphasis added.)

The object of the Preliminary Examination is not to prove guilt or innocence beyond a reasonable doubt, nor should the magistrate discharge a defendant when evidence conflicts or raises a reasonable doubt. Judge Leaming abused his discretion by applying a reasonable doubt standard to the Preliminary Examination and this is directly contrary to the authorities cited above. In reviewing the entire record, it is quite clear that there was credible evidence from which the Magistrate could conclude that a crime had been committed and probable cause that Defendant/Appellant committed it. By comparing the experts of the defense and the prosecution and all the contradictions in the evidence, the Magistrate was stepping into the shoes of the trier of fact. It was up to the trier of fact to make a determination as to whether or not this was a homicide or a suicide and not for the Magistrate. A reasonable person looking at all of the evidence could conclude that a crime had been committed and Defendant/Appellant committed it.

The magistrate breached his duty to bindover when there was presented to him conflicting credible evidence, thus he abused his discretion.

ISSUE II

THIS COURT SHOULD LIMIT THE ABILITY OF THE MAGISTRATE TO ASSESS THE CREDIBILITY OF THE WITNESSES AT THE PRELIMINARY EXAMINATION.

In its order granting the Application for Leave to Appeal, this Court has requested the parties to brief the issue of what is the appropriate role of the Magistrate at the preliminary examination in assessing credibility of witnesses and to what extent does that assessment affect the bindover decision.

The preliminary examination is not required by the Michigan Constitution but has been established by statute MCL 766.1 *et seq* ; MSA 28.919 *et seq*. As far as the duty of the Magistrate, there is nothing in the statute that indicates anything about how to deal with the credibility of witnesses. This Court, however, has provided that the magistrate has a duty to assess credibility. In reviewing case law it seems as if the first case to do so specifically was People v Paille II, 383 Mich 621, 627; 178 NW 2d 465 (1970). Paille, supra was a case which arose out of the Detroit riots of 1967 in which there was a charge of Conspiracy to Commit a Legal Act in an Illegal manor. In that case a bindover was denied. A Motion for Re-instatement and bindover of defendant was then filed by the People. In its opinion the Recorder's Court Judge had made the following comments:

> "That a magistrate may not be the judge of the credibility of the witnesses on examination is indeed a novel theory also. Yet it is on that theory that the People rest their case. * * * It is the duty of the magistrate to make his determination from the evidence. He can only make it and rest his conclusion on what he believes. He is not obliged to accept what to him is evident perjury in making his decision. Paille, supra 625

The Court in Paille II, supra then went on to state the following:

> In determining whether the crime of conspiracy had been committed, the magistrate had not only the right but, also, the duty to pass judgment not only on the weight and competency of the evidence, but also the credibility of the witnesses.

We have often commented upon the fact that the judge who hears the testimony has the distinct advantage over the appellate judge, who must form judgment solely from the printed words." [2]

(FN2.) In Hartka v. Hartka (1956), 346 Mich. 453, 455, 78 N.W.2d 133, 134, we said:

'The Court generally gives great weight to the findings of fact of the trial judge. The trial court is our arena for the test of truth. There the contesting parties and their witnesses appear face to face in flesh and blood with weight and size and demeanor under the eye of the trial judge. He sees the averted glance, marks the hesitation, detects the note of hysteria in the voice of a witness whose words may be calculated to deceive. The cold words on a printed page show none of these essentials to the search for fact. Donaldson v. Donaldson, 134 Mich. 289, 96 N.W. 448; Vollrath v. Vollrath, 163 Mich. 301, 128 N.W. 190; Cooper v. Cooper, 345 Mich. 44, 74 N.W.2d 892.'

For similar reasons we have held that it is for the trier of fact to determine the credibility of witnesses in criminal cases. People v. Clark (1954), 340 Mich. 411, 421, 65 N.W.2d 717.

This Court has also spoken about the duty to judge credibility by the magistrate in the case of People v Tally, 410 Mich App 378, 386; 301 NW 2d 809 (1981). This Court again reiterated that position in People v King, 412 Mich 145, 153, 154; 312 NW 2d 629 (1981). Even though this Court refers to the duty to assess credibility, in none of the cases cited above is any clarification or any direction given as to how the district courts should exercise this ability or if it in any way is expressly limited. The closest direction that the Magistrate has is that a defendant should not be discharged "when evidence conflicts or raises a reasonable doubt of guilt". People v Goecke, 457 Mich 442, 469; 579 NW 2d 868 (1988); King, supra 153-154, People v Medley, 339 Mich 486, 492-493; 64 NW 2d 708 (1954).

It is quite clear, pursuant to the case authority as of this date, that the Judge does have the ability to look at credibility. However, the question becomes, "To what extent or is that ability limited? Plaintiff/Appellee's position is that the ability to assess credibility arises when there is no conflict in the evidence or a reasonable doubt as to the defendant's guilt has not been raised and the evidence is totally incredible, implausible or unrealistic. A magistrate can only deal with that evidence that is presented to him. If he has a witness who appears before him and who as described in Paille shows physical signs that tell the magistrate that this particular individual is not credible and there is nothing else to refute the testimony then the Magistrate does have the ability to refuse to bindover. However, as in the case at bar where the magistrate refutes the testimony, attacks the credibility of the testimony of only one witness and there is other testimony that would allow this to be bound over, then it is the duty of the Magistrate to bindover. The Magistrate cannot allow himself to become the trier of fact. This is a fine line which must be recognized by each magistrate as he/she makes a determination. To do otherwise, would violate the principals of law as established by the statutes and the Constitution of the State of Michigan.

The Plaintiff/ Appellee would tend to agree with Defendant/Appellant that completely eliminating the Magistrate's ability to assess credibility would be a mistake. It appears as if this would completely hamstring the Magistrate in cases where the Magistrate knows or has good reason to know that the witnesses testimony is totally incredible, implausible, or unrealistic. If this issue is directly related to one of the elements of the offense or to the probable cause that defendant committed the crime, there might be the unjust result of binding over a case that has no business being in Circuit Court. However, giving a Judge complete unfettered ability to assess the credibility of a witness would affect the bindover again by putting the Magistrate in a position where he is constantly

acting as the trier of fact and completely circumventing the purpose and reason for the jury system.

Plaintiff/Appellee takes the position that it is better to have the magistrate know exactly how and when the magistrate can assess credibility in making a determination for a bindover. It is best that the Judge not assess credibility on a regular basis as that places him in a position of possibly being the trier fact. The Magistrate should not consider the credibility of the witness unless the testimony of that witness is implausible or incredible. It is only in that way that the duty of the trier of fact can be protected. Other jurisdictions have taken the position as does Michigan that when there is a conflict at the Preliminary Examination the Judge does not make a determination based upon that conflict. There are other jurisdictions where at the preliminary Examination the magistrate is instructed to view the evidence in the light most favorable to the prosecution. In a Colorado case, People v The District Court, 17th Jud Dist 926 P 2d 567 (Colo1996), the court was dealing with a preliminary examination where the Judge refused a bindover. The Court in that case discussed the principals of preliminary examination and in a footnote noted how the judge was to treat the credibility of witnesses at the preliminary examination. That section of this case at page 570 reads as follows:

> It is well settled that a preliminary hearing serves the limited purpose of determining "if there is probable cause to believe that an offense has been committed and that the person charged committed it." *People v District Court,* 803 P.2d 193, 196 (Colo.1990) (quoting § 16-1-104(14), 8A C.R.S. (1986)). The standard for finding probable cause requires only that the prosecution present evidence sufficient to induce a person of ordinary prudence and caution to entertain a reasonable belief that the defendant committed the crime charged. *People v. District Court,* 803 P.2d at 196. It is unnecessary for the prosecution to show beyond a reasonable doubt that the defendant committed the crime, or even the probability of the defendant's conviction. *Id.* Instead, the trial court is obligated at the preliminary hearing to view the evidence in the light most favorable to the prosecution. *People v. Juvenile Court,* 813 P.2d 326, 329 (Colo.1991). The prosecution therefore is accorded latitude at the preliminary hearing to establish probable cause that the defendant committed the

crime charged. *Id*[2]

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2. The respondent argues that the district court did not abuse its discretion because the testimony of the prosecution's key witness, Pittman, was inconsistent. However, a judge in a preliminary hearing may not consider the credibility of witnesses unless, as a matter of law, the testimony is implausible or incredible. *Hunter v. District Court,* 190 Colo.48, 52053, 543 P.2d 1265, 1268 (1975). When there is a mere conflict in the testimony, a question of fact exists for the jury, and the judge in a preliminary hearing must draw the inference favorable to the prosecution. *Id*

Another Colorado case, People v Jensen, 765 P2d 1028,1030 (Colo1988), stated that at the preliminary stage the evidence must be viewed in the light most favorable to the prosecution and that the magistrate is not to disregard the testimony of a witness that is favorable to the prosecution unless that testimony is implausible or incredible as a matter of law. The state of Utah also apparently follows a similar practice as in the case of State v Hester, 3 P3d 725 (Utah App 2000) the court noted that at a preliminary hearing the evidence must be viewed in lights most favorable to the prosecution and that the court must draw all reasonable inferences in the prosecutions favor. Also another Utah case, State v Talbot, 972 P2d 435 (Utah 1998), discusses what is necessary as far as credibility and evidence for a bindover. The court stated:

> "Unless the evidence is wholely lacking and incapable of reasonable inferences to prove some issue which supports the prosecutions claim, the Magistrate should bind the defendant over for trial." Talbot, supra 438

The terms implausible and incredible, wholly lacking in and incapable of reasonable inferences are all significant when dealing with the duties of the magistrate as it relates to both determining the sufficiency of the evidence and also in determining the credibility of both witnesses and the evidence. If the magistrate is to prevent himself from acting as the trier of fact he can only assess credibility in

situations where implausible or unrealistic or totally incredible testimony is presented to him. This is especially true where there is a conflict in the testimony. The Magistrate may have doubts about some of the testimony or the credibility of the witnesses as they testify, but unless on its face there is implausibility and total incredibility he must accept the testimony and bind the case over. The test that is used is in Colorado and Utah is logical.

Plaintiff/Appellee asserts that the magistrate does have the ability to assess credibility of witnesses at the preliminary exam, however this ability must be severely limited. It is only logical that this limitation be of a nature that is similar to that as has been described in use in Colorado and Utah.

ISSUE III

THE REVIEWING COURT APPLIED THE CORRECT STANDARD OF REVIEW WHEN AFTER REVIEWING THE ENTIRE RECORD IT MADE THE DETERMINATION THAT THE MAGISTRATE HAD ABUSED ITS DISCRETION.

The most recent description of the standard of review involving the bindover as a result of a preliminary examination comes from People v Drake, 246 Mich App 637; 633 NW2d 469 (2001) and reads as follows:

> "A magistrate's ruling that alleged conduct falls within the scope of a criminal statute is a question of law reviewed for error, and a decision to bind over a defendant is reviewed for abuse of discretion." People v. Orzame, 224 Mich.App. 551, 557, 570 N.W.2d 118 (1997). A circuit court reviews a district court's decision whether to bind over a defendant for an abuse of discretion. "[A] circuit court must consider the entire record of the preliminary examination, and it may not substitute its judgment for that of the magistrate.... Similarly, this Court reviews the circuit [246 Mich.App. 640] court's decision de novo to determine whether the district court abused its discretion." Hence, on appeal we review for an abuse of discretion the district court's original decision on the motion to bind over defendant."

This court has requested that the parties also review the issue of whether the reviewing court applied the correct Standard of Review in this case. The reviewing court in making its determination stated as follows:

> "The District Court abuses its discretion when the decision not to bindover amounts to a failure to perform a clear legal duty. People v Veal, 101 Mich App 772; 300 NW 2d 516 (1980). An abuse of discretion sufficient to allow the reversal of the District Courts decision is found only when an unprejudiced person, considering all of the facts upon which the court acted, would say that there was no justification or excuse for the ruling. People v Orzame, 224 Mich App 551; 570 NW 2d 118 (1997). This court finds that the District Court abused its discretion when it refused to bind the court over on the murder charge." (36a)

Plaintiff/Appellee in responding to the Court of Appeals used the Standard of Review from People v Carlin, (on remand) 239 Mich App 49, 63-64; 607 NW 2d 733 (1999) which reads as follows:

> "... we review the district court's decision in refusing to bindover defendant on the first thirteen counts of misconduct in office. (FN6) While this is actually a review of the circuit court's decision to affirm the decision of the district court, this Court generally applies the same standard of review as applied by the circuit court in reviewing the district court's decision not to bindover a defendant. People v. Abraham, 234 Mich. App. 640, 656, 599 N.W.2d 736 (1999). The circuit court may not substitute its judgment for that of the district court and may reverse only if it appears on the record that the district court abused its discretion. Id. " 'An abuse of discretion is found only where an unprejudiced person, considering the facts upon which the court acted, would say there was no justification or excuse for the ruling.' " People v. Mayhew, 236 Mich. App. 112, 124, 600 N.W.2d 370 (1999), [239 Mich. App. 64] quoting People v. Orzame, 224 Mich. App. 551, 557, 570 N.W.2d 118; 224 Mich. App. 551, 570 N.W.2d 118 (1997) "... we review the district court's decision in refusing to bindover defendant on the first thirteen counts of misconduct in office. (FN6) While this is actually a review of the circuit court's decision to affirm the decision of the district court, this Court generally applies the same standard of review as applied by the circuit court in reviewing the district court's decision not to bindover a defendant. People v. Abraham, 234 Mich. App. 640, 656, 599 N.W.2d 736 (1999). The circuit court may not substitute its judgment for that of the district court and may reverse only if it appears on the record that the district court abused its discretion. Id. " 'An abuse of discretion is found only where an unprejudiced person, considering the facts upon which the court acted, would say there was no justification or excuse for the ruling.' " People v. Mayhew, 236 Mich. App. 112, 124, 600 N.W.2d 370 (1999), [239 Mich. App. 64] quoting People v. Orzame, 224 Mich. App. 551, 557, 570 N.W.2d 118; 224 Mich. App. 551, 570 N.W.2d 118 (1997) "

As it relates to the issue of the bindover, the Court in Carlin also made the following comments:

> "The examining magistrate's function is "to determine whether a crime has been committed as whether there is probable cause for charging the defendant with that crime." People v Harris, 190 Mich App 652, 657; 476 NW2nd 767 (1991). At the preliminary examination, the Prosecution need not establish guilty beyond a reasonable doubt. People v Fiedler, 194 Mich App 682 693; 487 NW2nd 831 (1992). However, the evidence regarding each element of the crime or evidence from which the evidence may be inferred must exist. When the evidence conflicts or raises a reasonable doubt concerning guilt, there are questions for the trier of fact, and defendant should be bound over. id" Carlin, supra, 64.

It is obvious that the reviewing court made a determination that the magistrate abused it's discretion in not binding the case over for trial. It is also quite obvious from the Court's opinion that it reviewed the entire record in the case.(22a - 42a) The Court itself never mention under what standard it was acting on the review, but it certainly knew what it needed to do.

The reviewing court made a determination that the Magistrate had breached a clear duty which was to bindover based on the fact that there was conflicting evidence. The trial court cited the case of People Veal, 101 Mich App 772, 774, 775; 300 NW 2d 516 (1980), for the proposition that where there is a failure to perform a clear duty then there is an abuse of discretion. This position was reiterated in a footnote *In Re Payne*, 444 Mich 679; 701 Footnote 1; 514 NW 2d 121 (1994). The footnote while not dealing with the exact topic as the case at bar was dealing with jurisprudence in the state of Michigan. The footnote in Payne, supra cited to Wayne Co Prosecutors Office v Recorders Judge, 101 Mich App 772, 775; 305 NW 2d 516 (1980) which had been decided along with Veal, supra as follows:

> "In reviewing the decision of the Magistrate, a superintending court does not substitute its judgement or discretion for that of the Magistrate. It examines the record to determine whether there was an abuse of discretion amounting to a failure to perform a clear duty."

In the case at bar Dr. Virani's testimony was not unclear, unreasonable, or outrageous, and certainly it cannot be said that it was untruthful. Dr. Virani's testimony merely conflicted with the testimony and opinion of the other experts. (See Issue I, herein incorporated by reference)

Plaintiff/Appellee believes that the reviewing Court was correct in deciding that there was an abuse of discretion, but believes as does Defendant/Appellant that the review was *de novo*.

Pursuant to case law, if there is contradiction in the evidence then the trial court must bind the case

over. Drakes, supra. When the reviewing court is looking at the Magistrates decision, the reviewing court must make a determination as to whether or not the magistrate has followed the law and followed all of the steps that wouuld allow the magistrate to either bindover the case or refuse to do so. If the Magistrate has a duty to bind over when there is a conflict then he can have no discretion when a conflict arises. In this case as a matter of law, the Magistrate should have bound the case over because of the fact that Dr. Virani's testimony in and of itself was not totally incredible, unreasonable, or shown to be intentionally inaccurate and it was in conflict with testimony presented by the defense. Because this is a matter of law the reviewing court would be making the determination *de novo*. This is a situation much like cases dealing with the admission of evidence. The admission of evidence is normally reviewed on the basis of an abuse of discretion however, when the admission of the evidence involves a preliminary question of law that is whether a rule of evidence or statute permits the admissibility of the evidence then the court reviews that issue question of law *de novo*. People v Lukity, 460 Mich 484, 488; 596 NW 2d 607 (1999)

A review of the Court's written opinion shows that it considered the entire record . It included a lengthy outline of the facts of the case.(22a - 23a). The court also concluded that there was an abundance of credible evidence on both sides. (38a) The court did not posture an opinion on the results but indicated that there was a sufficient basis for a finding of probable cause.

One must remember that the preliminary examination is much like a screening process, the purpose of the preliminary examination is to protect the defendant from the indignity of a public trial before any probable cause has been established. It takes the place of the presentment by a grand jury. People v Becktel, 80 Mich 623, 632; 45 NW 2d 582 (1890) The preliminary exam is not a judicial inquiry it is only an inquiry Duncan, supra. It is merely a step in the process which allows the

defendant the opportunity to find out if in fact there is probable cause and if he in fact will be tried. As already noted the magistrate is not to find proof beyond a reasonable doubt. The Magistrate is not to place himself in the position of the trier of fact and when he does so a reviewing court should take action. The evidence that was presented provided more than a mere suspicion but not necessarily rising to proof beyond a reasonable doubt. The court had information regarding the death of the child and that information contained testimony that was conflicting. Likewise, the trial court had testimony of suspicious circumstances involving the mother of the child and the finding of the pills and the relationship of the child and the mother prior to the hearing. Again in relationship to that there was some conflicting testimony. Under the circumstances of the case it was clear that the magistrate did have a duty to bindover and the Circuit Court was correct in requiring such.

The fact that the Court did not state that the standard of review was de novo does not change the fact that the record clearly shows that the review was exactly that type of review, After the review was done with the court found that the Magistrate had abused its discretion. There was no error in the standard of review used in this case by the reviewing court.

RELIEF REQUESTED

Plaintiff/Appellee requests this Honorable court to affirm the decision of the Circuit Court and remand to District Court for further action as required by the Order of the Circuit Court.

Respectfully submitted,

Dated: 6/19/02

Martha G. Mettee

MARTHA G. METTEE P31816
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